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On the Liberty of the English: Adam Smith's Reply to Montesquieu and Hume

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Abstract

This essay has two purposes—first, to identify Adam Smith as intervening in the debate between Montesquieu and Hume regarding the nature, age, and robustness of English liberty. Whereas Montesquieu took English liberty to be old and fragile, Hume took it to be new and robust. Smith disagreed with both: it was older than Hume supposed, but not fragile in the way Montesquieu claimed. The reason for this was the importance of the common law in England's legal history. Seeing this enables the essay's second purpose: achieving a more thorough and nuanced understanding of Smith's account of liberty. This requires us to go beyond repeating Smith's famous claim that modern liberty was the result of the feudal barons trading away their wealth and power for inane status goods. As I demonstrate, this is only one part of a much wider story: of liberty requiring, and also being constituted by, the rise of the regular administration of justice, and ultimately the rule of law. Although Smith's history of the English courts and common law has been almost entirely neglected by scholars, it is indispensable to understanding both his reply to Montesquieu and Hume and his wider political theory of modern freedom.

Keywords

Adam Smith, David Hume, Montesquieu, rule of law, liberty

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Introduction

The purpose of this essay is twofold. First, it seeks to locate Adam Smith as intervening in the debate between Montesquieu and Hume on the origins, age, and robustness of English liberty. In *The Spirit of the Laws*, Montesquieu famously took the liberty of the English to be old, but also fragile. Responding in *The History of England*, Hume took the opposite view: English liberty was only as old as the 1688 settlement, and yet nonetheless likely to prove robust. Smith took an intermediate position, seeking to correct and improve both in turn. Core aspects of English liberty long predated the Glorious Revolution in ways Hume had not appreciated. Yet those same features ensured Hume was nonetheless right, and Montesquieu mistaken: English liberty ought to prove robust.

Appreciating how and why Smith came to this position enables the essay's second purpose: facilitating a more thorough and nuanced appreciation of Smith's understanding of modern liberty, of where it came from and what it required. In particular this means going beyond Smith's well-known account of how the feudal barons frittered away their political power by wasting their wealth on inane status goods (WN III.iv.10; LJ(A) iv.157–58).[1] For despite the prominence that this part of Smith's narrative has assumed in the established scholarship, it is only one part of his overarching account, and to properly appreciate the role that it plays we must integrate it much more fully with

1. References to Smith's works take the following abbreviations. CAS: *The Correspondence of Adam Smith*, ed. E. C. Mossner and I. S. Ross, rev. ed. (Oxford: Clarendon Press, 1987), 2 vols.; LJ(A): "Lectures on Jurisprudence," report of 1762–63, in *The Glasgow Edition of the Works and Correspondence of Adam Smith: Volume V – Lectures on Jurisprudence*, ed. R. L. Meek, D. D. Raphael, and P. G. Stein (Oxford: Clarendon Press, 1978); LJ(B): "Jurisprudence or Notes from the Lectures on Justice, Police, Revenue, and Arms delivered in the University of Glasgow by Adam Smith, Professor of Moral Philosophy, report dated 1766," in *The Glasgow Edition of the Works and Correspondence of Adam Smith: Volume V – Lectures on Jurisprudence*, eds. R. L. Meek, D. D. Raphael, and P. G. Stein (Oxford: Clarendon Press, 1978); LRBL: *The Glasgow Edition of the Works and Correspondence of Adam Smith: Volume IV – Lectures on Rhetoric and Belles Lettres*, ed. J. C. Bryce (Oxford: Clarendon Press, 1983); TMS: *The Glasgow Edition of the Works and Correspondence of Adam Smith: Volume I – The Theory of Moral Sentiments*, eds. D. D. Raphael and A. L. Macfie (Oxford: Clarendon Press, 1976); WN: *The Glasgow Edition of the Works and Correspondence of Adam Smith: Volume II – An Inquiry into the Nature and Causes of The Wealth of Nations*, ed. R. H. Campbell, A. S. Skinner, and W. B. Todd, 2 vols. (Oxford: Clarendon Press, 1975).

Smith's wider jurisprudential and historical frameworks (e.g., Skinner 1976; Forbes 1976; Winch 1978, chap. 4; Berry 1994, 152–73; Berry 2013, chaps. 4 and 5; Hont 2005, chap. 5; Hont 2009; Luban 2012; Rasmussen 2008, chap. 4; Salter 1992). Specifically, we need to pay much closer attention to Smith's emphasis on the regular administration of justice: on the emergence of the rule of law in general and of the birth of the English common law in particular. Only once this is done can we appreciate what Smith had to say about the nature and history of modern liberty, as well as why he believed the English enjoyed it to a historically unprecedented degree.

Old but Fragile: Montesquieu on the Liberty of the English

Hume engaged closely with Montesquieu's *Spirit of the Laws* following its publication in 1748, coming as it did between the first edition of Hume's political essays in 1741 and the first and second volumes of *The History of England* in 1754 and 1756. Hume's *History* was in part a response to the Frenchman's claims about the nature of the English constitution, not just for their own sake but also insofar as Montesquieu took essentially the same positions as Bolingbroke, another key opponent of Hume's (Skjönsberg 2021, 183–84; Selinger 2019, chap. 1; Shackleton 1961, 297–98). Smith evidently read Hume's *History* and indeed appears to be drawing directly on his friend's narrative in the sections of *LJ* dealing with England's political history. He was also an attentive reader of Montesquieu, taking over the Frenchman's division of European constitutions in "monarchies" versus "republics" (of which democracies and aristocracies were subvariants, not fundamentally different regime forms [Sagar 2018, 182–92]). But on the specific matter of the origins, age, and robustness of English liberty, all three disagreed.

For present purposes we may sidestep the vexed question of where England fits in Montesquieu's typology of republics versus monarchies (Pangle 1973; Rahe 2009; Spector 2012; Douglass 2012; De Dijn 2014) and hence the extent to which he was an outright admirer of the English system of government and the degree to which he thought it could or should be emulated in other historical and geographical locales (De Dijn 2011, 2013; Tomaselli 2006). Instead we can focus specifically on the question of liberty—of why and to what extent Montesquieu thought the English possessed it.

Montesquieu divided liberty into two aspects: that of the constitution and of the citizen. The former referred to the mechanics of government, the second to the system of criminal and civil laws. Both were crucial

insofar as Montesquieu understood freedom in terms of the security of the individual: "that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen" (Montesquieu 1989, XI.6). As well as a constitutional order guaranteeing security by protecting the population from domination and abuse arising because of excessive concentrations of political power, individuals also needed to live under a system of crime and punishment that was nonarbitrary and predictable, ensuring that they were secure in their private lives as well as vis-à-vis the actions of the state.

This meant, however, that liberty was not unique to any specific regime type. In particular those who claimed that only democracies guaranteed freedom were mistaken because "the power of the people has been confused with the liberty of the people" (Montesquieu 1989, XI.2; Douglass 2012, 715–16; De Dijn 2011, 193–94; McDaniel 2013, 32–33). What mattered was that a regime was "moderate"—that the constitutional powers arrayed within it were organized in such a way as to check each other, ensuring that none came to dominate the others, for that would inevitably lead to "abuse": "So that one cannot abuse power, power must check power by the arrangement of things" (Montesquieu 1989, XI.4). Combining this with a system of fair trials generated liberty for ordinary people. As a result, there was no reason that *monarchy* could not be a moderate regime and hence one that afforded liberty, provided it was constituted according to a system of internal checks and balances that prevented the monarch from accruing such unilateral power that this succumbed (as it inevitably otherwise would) to abuse. A separation of powers was thus crucial, but there was no one unique way of achieving this (Krause 2002, 716–17). Although Montesquieu made clear that it would be wise to separate out and keep independent of each other the legislative, judicial, and executive functions of government, so as to prevent concentrations of power and thus ensure security of the citizens, there were many ways this could be achieved. In particular, Montesquieu insisted that the modern monarchies of Europe, descended from the Gothic systems of rule that had come to settle over the north of the continent after the collapse of the Roman empire, had evolved the particular innovation (unknown to the ancients) of ensuring just such a separation of powers. This was the practice of the monarch ruling alongside and through a body of nobles, who could appeal to a depository of laws (enacted through regional *parlements* in France) that acted as a constraint on what the monarch could do. Insofar as modern monarchy was constructed in such a manner, it qualified as a moderate regime and hence one that provided liberty—indeed, was *more* likely to provide liberty than republics were due to its inherent tendency to moderation (Sonenscher 2007, 121–73; McDaniel 2013, 25–31).

England was a particular and unique case, however. This was because the Henrician reforms and the subsequent unravelling, and then remaking, of the constitutional order in the seventeenth century had led to the purposeful and intentional implementation of a constitutional settlement geared specifically toward promoting liberty, achieved by enshrining a demarcated separation of powers. This made England unique: it was "the one nation in the world whose constitution has political liberty for its direct purpose" (Montesquieu 1989, XI.5). Rather than relying on a slowly evolved depository of laws checking a monarch through the countervailing power of the nobility, England's freedom rested in an explicit separation of powers actualized by the post-1688 mixed constitution. In a sense, then, English liberty was sustained by new means. But in another sense the liberty of the English was much older. This was because the 1688 settlement was based on the principles of representative government Montesquieu identified as being bequeathed by the Germanic peoples who spread out across northern Europe after the Roman collapse. As he famously put it, "If one wants to read the admirable work of Tacitus, *On the Mores of the Germans*, one will see that the English have taken their idea of political government from the Germans. This fine system was found in the forests" (Montesquieu 1989, XI.7). The post-1688 settlement was a new manner of establishing the separation of powers, but it was a continuation of a much older commitment to the liberty of the constitution that could be traced to the practices of representation that were "at first a mixture of aristocracy and monarchy," itself "the origin of Gothic government among us" (Montesquieu 1989, XI.8).

English liberty was therefore old. But it was also, Montesquieu suggested, fragile (McDaniel 2013, 32–38). This was precisely because the nobility of England had been effectively destroyed as a political force, in part by allowing the nobles to engage in commerce, which Montesquieu believed inevitably corrupted their ability to act as checks on Crown power, and due to the effects of civil war and reform (XX.21; Douglass 2012, 712). On Montesquieu's assessment, French liberty—upheld by a monarchy ruling through a nobility appealing to a depository of laws—was more secure. English liberty would last only as long as those subject to the constitution were prepared to go along with it. If their commitment to that particular mode of separating powers faltered, the constitution would fail and liberty would soon be lost. "In order to favor liberty, the English have removed all the intermediate powers that formed their monarchy. They are quite right to preserve that liberty; if they were to lose it, they would be one of the most enslaved peoples on earth" (Montesquieu 1989, II.4).

Such was Montesquieu's verdict. English liberty was ancient, even if it was currently sustained via a relatively new method for achieving the separation of

powers. Yet that unique method —the English mixed constitution—was fragile, depending entirely on the continued willingness of the citizenry to go on adhering to it. Because of the reforms that had taken place prior to 1688, most especially the removal of the nobles as a serious political force, England lacked the sort of deeply rooted check on the power of the monarch that France enjoyed. Accordingly, when it came to liberty in terms of legal security Montesquieu turned his attention, in Parts V and VI of *The Spirit of the Laws*, not to England but to France (Levy 2015, 154–58). This verdict about the fragility of English liberty, however, was one that first Hume, and then Smith, sought to challenge.

New and Robust: Hume on the Liberty of the English

Hume agreed with Montesquieu that liberty was quite compatible with monarchy under modern European conditions. As he famously wrote, "It may now be affirmed of civilized monarchies, what was formerly said in praise of republics alone, that they are governments of Laws, not of Men" (Hume 1985, 94). Yet Hume disagreed with Montesquieu's claim that English constitutional order was inherently precarious. In the essay "The Politics May be Reduced to a Science," Hume claimed that it was nothing less than "an universal axiom in politics, *That an hereditary prince, a nobility without vassals, and a people voting by their representatives, form the best* monarchy, aristocracy, *and* democracy"—with the English constitution, of course, being a mix of all three (Hume 1985, 18, emphasis in original). But even if England had an admirable and robust form of constitution, that still left open the two further questions Montesquieu had raised: how old was English liberty, and how fragile ought it to be considered? Hume's answer to the first question came in *The History of England*, his position being crystal clear by the time he concluded the Stuart volumes in 1756. Contrary to Montesquieu's judgment, English liberty was not old but very new indeed.

According to Hume, the Tudor dynasty that preceded James I and VI was unambiguously an arbitrary despotism (Hume 1983, 5:124). and there was no idea of limited monarchy prevalent in England prior to the Stuarts (5:35). At the outset of James's rule, England was not significantly better positioned vis-à-vis liberty than its European neighbors (5:59). However the realignment of wealth and property—and hence of power—in the late Tudor and early Stuart period necessitated a shift in the composition of political institutions as the "spirit of liberty" became increasingly strong, eventually culminating in a series of spectacular constitutional crises (5:40). Prior to this, however, "it is easy to see, how inaccurate the English constitution was,

before the parliament was enabled, by continued acquisitions or encroachments, to establish it on fixt principles of liberty" (5:43).

Under James I, the Crown held extensive arbitrary power, while Parliament's position was weak and precarious (5:126–27). The great feudal barons had long ago traded away their political power for the chance to purchase trinkets and luxuries (5:134). The result was that the Crown exercised largely unchallenged authority. Although formal statutes theoretically protected the liberties of subjects, these had been ignored for centuries. Yet as the balance of property and power shifted, Hume claimed, designs for regular plans of liberty emerged. During the reign of Charles I, the first serious attempts to constrain arbitrary royal power were made by appeal to the existing law and precedents, beginning with the Petition of Right in 1628 (5:178–81).

The 1630s, however, revealed a general state of confusion about the very nature of the English constitution, let alone a consensus on what powers were rightfully held by which actors (5:239). There existed no general liberty under Charles I, even if some were agitating for it, and on Hume's view things would likely have stayed that way were it not for the crisis precipitated by the Scottish Covenanter rebellion in 1639 causing a cash-strapped king to recall Parliament after an eleven-year hiatus in a desperate bid for supply. This initiated the train of events that led to the Civil War, although Hume was keen to emphasize that religious divisions and enthusiasms heightened a popular (albeit erroneous) belief that the Crown was an implacable threat to the liberty and security of the people, one that could be dealt with only via armed resistance (5:380–88; Skjönsberg 2021, 182, 186). The 1640s saw the outbreak of the first Civil War of 1642–46, and then a long cycle of revolutions and rebellions. Clearly, Hume thought, there was no meaningful political liberty under such conditions of anarchy and violence. The security situation was eventually resolved only through the rise of Cromwell, who by subjugating his enemies, and then his erstwhile allies, erected a military monarchy under the name of a republic, which was as arbitrary and despotic a form of government as could be imagined. In Hume's judgment, through their very zeal for liberty the parliamentary faction had destroyed that liberty entirely, ushering in the absolute rule of one man, who reduced the nation to "slavery" (5:520).

The Restoration of 1660 did not, however, automatically deliver unto the English a secure and settled system of liberty. Although the coronation of Charles II did improve matters by ending the arbitrary government overseen by Cromwell, an enthusiasm to welcome the king back to England initially led the pendulum to swing too far toward royal power and prerogative, while the fundamental incoherence of the English constitution as regards the balance between Crown and Parliament was not resolved (Hume 1983, 6:190–91).

Initially showing excessive deference to Charles II out of a desire to restore constitutional order, Parliament soon reverted to type and jealousy over the rights and liberties of subjects vis-à-vis Crown prerogative mounted once more. The infamous "Cabal" of ministers plotted to make Charles II absolute, while Parliament resisted this in ever more fraught terms, with both sides increasingly distrusting of each other (6:284–308). Repression of the Scottish Presbyterians fed into a wider Protestant hysteria south of the border, while the national lunacy of the Popish Plot led to increased factionalism and judicial murders on both sides. Hume paints a picture of a period in which the king sought to extend his powers as far as possible, jealous of his own Parliament, while Parliament itself was out of control in its persecutory actions, the result being that ordinary citizens lacked basic securities. Furthermore, widespread hostility to the Duke of York—the future James II—due to his openly Catholic faith led to the Exclusion Bill controversies, which proved that the English constitution in this period was not settled in its fundamentals (6:389–90). Similarly, the Crown's open and successful attacks on city corporations were evidence that the constitution was not at all decided in favor of liberty (6:423–44).

The situation only grew worse with the coronation of James II in 1685. From the outset, James's actions showed that he was disposed toward exercising arbitrary power (6:450–54). Remarkably, Hume judged that he would likely have *succeeded* in rendering himself absolute, such was the weakness of his opponents, had he not been foolishly actuated by a desire to turn his kingdoms Catholic (6:475). In a nation terrified of a return to Popery, the combination of James's political ambitions and his religious zealotry lost him the support of the established Church, the English nobility, the Whig and Tory factions, and both Houses of Parliament, all uniting to depose him. It was only with the Glorious Revolution, and the worked-out settlement effected by inviting the House of Orange to take the throne under specific terms, that England's constitutional contradictions and incoherencies were finally resolved. Hence, it was only in 1688 that English liberty was finally established and secured:

> The revolution alone . . . put an end to all these disputes: By means of it, a more uniform edifice was at last erected: The monstrous incoherence, so visible between the ancient Gothic parts of the fabric and the recent plans of liberty, was fully corrected: And to their mutual felicity, king and people were finally taught to know their proper bounds (6:475–76, cf. 530–31).

Against Montesquieu, Hume's verdict was that English liberty was not old but very new indeed. As for Montesquieu's suggestion that its origins nonetheless lay in the woods of Germany, in the medieval volumes of the

History Hume would comprehensively debunk any such notion, collateral damage to his destruction of the Whig fiction of an ancient constitution. But how secure was this new English liberty? Hume's *History*—like his political essays—was written with a close eye on the tensions and animosities of his own day. If anything, Hume judged Montesquieu to have been too sanguine about the potential for British party strife to be fatally destabilizing (Skjönsberg 2021, 183–84). The long-standing preponderance of the Whigs following the Hanoverian settlement led Hume to worry that partisan factionalism, if not checked, could plunge Britain back into the turmoil of the seventeenth century (Forbes 1975, 136, 202–4, 220–22, 227, 267, 309–10; Hanvelt 2012, 18–20; Landis 2018; Skjönsberg 2021, chap. 7; Sabl 2012). *The History* was in part a warning to treat facts about the past honestly and itself an attempt to dampen-down factional animosity to ensure that the lovers of liberty did not again destroy the very thing for which they were so zealous (Hume 1983, 6:532–33; Herdt 1997; Sagar 2021). As Hume intimated throughout *The History*, and spelled out explicitly in his late essay "Of the Origin of Government," good rule needed both authority *and* liberty and neither should be allowed to preponderate too far (Hume 1985, 40). The presence of party was an ineliminable feature of a mixed regime and so had to be managed rather than purged; attempting to eradicate factional opposition would not only prove impossible but likely destroy the genuine blessings of liberty in the process. Yet *if* party hatred could be controlled (and that, for Hume, was a genuinely open question) and reverence for the mixed constitution maintained on all sides, there was no reason to think the English constitution especially fragile simply by its nature, and certainly not for the reasons Montesquieu suggested. While it might be the case that Britain tended more to absolute monarchy than a republic (Hume 1985, 47–53), and while no regime could reasonably be expected to continue unchanging in perpetuity, there was nothing about the English (and after 1707, the British) constitution in and of itself that marked it out as peculiarly precarious, so long as the vagaries of faction were contained. On the contrary, the English could boast at having stumbled into the best form of constitution ever known, one likely to prove secure so long as it was properly looked after.[2] Hume thus rejected Montesquieu's verdict on both counts: English liberty was not old but very new. And rather than being inherently fragile, so long as the danger of faction was successfully guarded against, it ought to prove robust.

2. If there was a major threat to the British constitution other than that posed by faction, Hume claimed, it came not from the structure of the constitution itself but from the new innovation of national credit used to fund unlimited war finance (Hume 1985, 349–65; Hont 2005, chap. 4).

Smith on Modern European Liberty

Smith would come to intervene directly in this debate. Yet appreciating what he had to say regarding the liberty of the English specifically requires our first having in view his account of the origins of modern European liberty more generally. This means going beyond repeating Smith's well-known claim that the feudal barons traded away their wealth and power, in the form of dependent retainers, for the chance to purchase opulent luxury goods (WN III.iv.10; LJ(A) iv.157–58). Smith's story posits the collapse of baronial power as merely one part, albeit an important one, of a much wider process leading to the emergence of modern European liberty. What made the crucial difference for Smith wasn't simply the barons giving away their power through foolish economic consumption, but the emergence of law, and eventually the rule of law, as a means of checking social and political domination.

Smith believed that law first originated as a means for the rich to secure themselves against the depredations of the poor (WN V.i.b.12; Harris 2020). However, law quickly became a means by which the rich came to exploit the poor instead. This was because social superiors who acted as judges demanded bribes in order to arbitrate disputes, and "justice" would go to whoever could pay the most (WN V.i.b.13; LJ(A) iv.16). Later, however, the emergence of governmental legislatures led to the innovation of using law as something that could check the judges themselves, subduing and making regular their otherwise arbitrary judgements (LJ(A) v.110–11; Hont 2009, 156–58; 2015, chap. 3). This enabled major sociopolitical and economic development, in particular when the practice of regular justice led to the idea that all property holdings, no matter how small, were equally sacrosanct and therefore deserving of protection by a common centralized power (LJ(A) i.131; WN III.ii.6, III.ii.14). This delivered levels of economic and social security unprecedented in human history, protecting the poor and weak from the aggressive attentions of the rich and powerful, whom Smith thought were otherwise overwhelmingly likely to predate upon them. This led in turn to vastly increased economic prosperity due to the stability engendered by secure property relations. In time the idea of the rule of law—of all being bound by the same code, regardless of social, economic, and political status—came to be applied not just to the judges who administered the laws but to the very governments who made them. This finally gave rise to an understanding that the executive, legislative, and judicial branches of government ought to be separated and made to check and balance each other. Once such a separation of powers was institutionalized, it decisively curbed arbitrary political power, hugely augmenting the security of ordinary citizens, promoting the liberty of all on a historically unprecedented scale. As Smith put it:

> upon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power, but that it should be rendered as much as possible independent of that power (WN V.i.c.25).

The rule of law and separation of powers were uniquely modern postfeudal achievements, unknown to the ancient world, their being the product of numerous unintended and unforeseen historical accidents following the collapse of Rome. Such a state of affairs was, however, unambiguously to be celebrated. As Smith is recorded as telling his students in LRBL, "This Separation of the province of distributing Justice between man and man from that of conducting publick affairs and leading Armies is the great advantage which modern times have over antient, and the foundation of that greater Security which we now enjoy both with regard to Liberty, property and Life" (LRBL ii.203).

Yet how and why had such a state of affairs actually come about as a matter of historical record? The first part of Smith's answer is located in Book III of WN. The process began, he explained, when the early feudal kings of Europe sought to gain an advantage over the warlords who were putatively their feudal underlings but frequently disobeyed the king to make war on each other, or even the Crown itself. Following the collapse of Rome and the rise of allodialism in the eleventh century, the barons settled in the countryside, abandoning the towns in favor of fortified rural strongholds. Yet the manufacturing bases of the towns generated growing economic prosperity in these relatively refined centers of production—and which the barons preyed upon as sources of plunder. After feudalism succeeded allodialism around the twelfth century, regional kings sought ways to control their unruly warlords, while the burghers of the manufacturing towns sought protection from periodic baronial assault. Recognizing that the enemy of an enemy was a friend, and that each could materially gain through cooperation, the burghers and kings hit upon a mutually advantageous solution. The kings granted the power of raising and collecting taxes to the burghers directly, thus taking it away from the feudal lords and offering military protection in return. This benefited the king, who gained a much more reliable and regular tax take from the grateful burghers while also depriving his rivals of funds. The burghers, by contrast, were happy to pay more in tax to the king in the short term so as to secure their trading rights and martial security, vastly increasing their personal wealth in the

long run: "Mutual interest, therefore, disposed them to support the king, and the king to support them against the lords" (WN III.iii.8).

Crucial to Smith's story was that this entirely self-interested, but mutually advantageous, arrangement enabled the burgher towns to become self-governing: the feudal kings "voluntarily erected a sort of independent-republicks in the heart of their own dominions" (WN III.iii.7). Freed from vassalage to the barons, the burghers began administering their internal affairs according to standardized legal codes. It was therefore in the cities that the regular administration of justice first emerged in the post-Roman world, employed as a mode of governing a unified political community, with the rule of law starting to operate in turn. As a result, "how servile soever may have been originally the condition of the inhabitants of the towns, it appears evidently, that they arrived at liberty and independency much earlier than the occupiers of land in the country" (WN III.iii.3). As a result, "The principal attributes of villanage and slavery being thus taken away from them, they now, at least, became really free in our present sense of the word Freedom" (WN III.iii.5).

On Smith's account, European liberty—actualized through the "regular administration of justice"—first emerged in the towns *alongside* the continued existence of baronial domination, and hence unfreedom, in the countryside. "Order and good government, and along with them the liberty and security of individuals, were, in this manner, established in cities, at a time when the occupiers of land in the country were exposed to every sort of violence" (WN III.iii.12). But the liberty that the burghers secured for themselves would generate epochal changes, far beyond their city walls.

In some territories—principally Switzerland and Italy—the success of the burghers was so extensive that they became powerful enough to throw off the rule of the kings entirely, their cities becoming fully independent republics. In larger countries such as France and England, the burghers could not become wholly independent and remained incorporated as part of the existing state (Hont 2005, 107–8; 2009, 162–63; Winch 1978, 76–71; Forbes 1976, 199–200). Yet in both cases the rise of opulence in the towns led to the explosion of luxury manufactures, as city-based productions became ever more refined due to the cumulative effects of prosperity, stability, and the division of labor, as well as being augmented by the historical anomaly of the Crusades due to the vast wealth that thereby flowed through the city states of southern Europe. The increased availability of luxury manufacturers—the economic outcome of the freedom won by the burghers several centuries earlier—led to Smith's repetition of the claim that Hume had already made, but which the younger man now grounded in a pan-European historical and economic framework: that the feudal barons traded away their wealth and power for baubles and trinkets produced by

the manufacturing centers of the more economically developed urban centers, rendering themselves politically irrelevant in the process (Hont 2005, chap. 5; 2009, 162–68).

Liberty could now finally be exported to the countryside several centuries after it had been established in the towns. This was because the collapse of the barons created a power vacuum that was eagerly filled by the monarchs, who took decisive control over their territories and thereby rendered themselves absolute. But how could *absolute* monarchy be compatible with liberty? Although affairs were at this stage imperfect and would go on to be further refined in later history, Smith's answer was that for ordinary people absolute rule by a distant monarch was typically vastly superior to arbitrary domination by a local tyrant (LJ(A) iv.98–99, 161–64; WN III.iv.15). Although the new absolute monarchs were not themselves constrained by the laws of the land, it was in their interest to provide for the regular administration of justice in the nation as a whole. For the most part the kings of early modern Europe ensured that *everyone else* lived under a predicable set of legal codes, even if they personally remained above the law. For ordinary people this tended to be a vast improvement when compared to the caprice of a local baron. The collapse of feudal power was thus crucial to the emergence of modern liberty in western Europe not simply for its own sake, but because it was only once the barons were gone that justice could be regularly administered according to standardized legal codes. The unintended but entirely welcome consequence of the self-interested economic interactions between the barons and the burghers was that a "regular government was established in the country as well as in the city, nobody having sufficient power to disturb its operations in the one, any more than the other" (WN III.iv.15). The result was the widespread attainment of liberty, thanks to the security and protection now enjoyed under the meaningful administration of law.

Yet arbitrary government under absolute monarchy, even if it was a substantial improvement in terms of the regular administration of justice, evidently fell short of the fully fledged rule of law that Smith saw as enabling the most developed forms of modern liberty that were enjoyed in the western Europe of his own day. Accordingly, while such an advanced state of liberty was crucially forwarded by the collapse of the barons, it was not fully secured until later, and only in those specific political circumstances in which rulers, and not just judges, were themselves brought under the purview of the law. The nation that had advanced most fully to such a state of affairs was England (though other western European states were not without a claim to something similar, if more imperfect). In accounting for how and why this was so, Smith went beyond Hume's

narrative in *The History of England* and incorporated into his account a facet of English history that Hume had been comparably inattentive to: the rise and importance of the common law.

Between Montesquieu and Hume: Smith on the Liberty of the English

In his analysis of the history of English liberty as recorded in LJ, Smith would take much more seriously than both Hume the Frenchman's suggestion that liberty must be understood not just in terms of the form of constitution and wider political order, but also regarding the security of citizens as achieved via the legal system, and especially the operation of fair trials. Yet despite having earlier drawn attention to both these aspects of freedom in the *Spirit of the Laws*, in his famous discussion of English liberty in Book XI, Montesquieu considered only the design of the English constitution and made no specific reference to England's wider legal practices and traditions (though he had much to say about France's (Levy 2015, 154–58). Similarly, while Hume did note the importance of *habeas corpus* and its connection to liberty at various points in the *History*, he tended to do so only incidentally, in a narrative centrally focused on the high politics of court and Parliament and not the day-to-day affairs of legal administration (e.g., Hume 1983, VI.366, 385, 438–39). Certainly, there is no sustained effort by Hume to tell a story in which the liberty he believed was only secured by the 1688 revolution was itself augmented and buttressed by a wider legal culture that was by that point centuries old. This was where Smith importantly differed, offering a sustained account of England's legal history and practices.

At the level of high politics and overarching constitutional history, Smith in the *Lectures* essentially followed Hume's narrative in the Stuart volumes of *The History*, agreeing with Hume that the Tudor monarchs were as arbitrary and absolute as their European neighbors (LJ(A) iv.160, 164). Yet Britain was an island. This meant its military power was concentrated on naval capacity, especially once the union of the English and Scottish crowns negated the need for terrestrial border defense, with the Stuart kings no longer retaining a significant land army (LJ(A) iv.168–70). This would have major consequences when Elizabeth's short-termism regarding Crown finances bequeathed a political time bomb that blew up under the Stuarts. Charles I was both unable to put down the Scottish rebellion for lack of regular established troops and lacked the funds required to pay those he had recruited for the purpose. Forced to recall Parliament and ask for supply, this resulted in the Civil War and eventually

the "military monarchy" of Cromwell (LJ(A) iv.170–79, v.1). Like Hume, however, Smith saw the Restoration as failing to settle the deep-rooted constitutional contradictions inherent to English government in the period, while James II came perilously close to surviving the attempt to oust him thanks to the deference to royal authority widely exhibited by ordinary subjects (LJ(A), iv.170–74). Yet happily the Glorious Revolution did succeed, and it settled the matter decisively in favor of a "system of liberty" (LJ(A) iv.178). A core reason for this being decisive was that following 1688 it became impossible for the Crown to secure supply without direct and frequent consent of Parliament, meaning the two powers checked each other but with the legislature now decisively having the upper hand. Furthermore, while a standing army was now established in England, in the wake of the great shift of power and property cemented by the Glorious Revolution, it was impossible for the Crown to turn this against the nation, not least because many high-ranking military officers were also members of Parliament (LJ(A) iv.178–79, v.1).

But this did not mean that English liberty was only as old as 1688, as Hume concluded. For alongside this narrative of English political history, Smith in LJ also examined the rise of the common law and the functioning of the English courts. He thus considered matters not just in terms of the overarching constitution but of the wider legal system—that is, the other side of the coin of liberty to which Montesquieu had originally drawn attention. These passages have, however, received little scholarly notice, perhaps because they are some of the densest parts of the work, and their relevance is not immediately obvious. (Smith's tendency to engage in long digressions about obscure points of English legal history does not help.) Nonetheless, these aspects of the text are crucial.

Smith notes that the 'system of liberty' achieved in 1688 became secure thanks to being 'confirmed by many Acts of Parliament and clauses of Acts' (LJ(A) v.5). At one level this ensured the system of English liberty became deeply rooted in convention and custom: "Every one would be shocked at any attempt to alter this system, and such a change would be attended with the greatest difficulties" (LJ(A) v.5). But at another, deeper, level it was because this system of government had been grafted onto, and was greatly enhanced by, a wider preexisting legal framework. Central to this was that "all judges hold their office[r]s for life and are intirely independent of the king. Every one therefore is tried by a free and independent judge, who are also accountable for their conduct." In England both "judge and jury have no dependance on the crown." This constituted a major "security of liberty" (LJ(A) v.5) for reasons Smith would go on to explain. Once again, however, it was the unintended outcome of accidents of history.

Smith located the origin of this wider legal framework in the self-interested motivations of Edward I. Wishing to discharge the onerous and expensive task of administering justice, while also erecting curbs on the power of his feudal barons, Edward divided the existing courts and transferred the power of judging away from the nobles who had traditionally wielded it, vesting it instead with "the meanest sort of no fortune or rank, who had been bread [*sic*] to the knowledge of the law, and very frequently these were clergy men" (LJ(A) v.21). Edward did this out of purely self-interested ends, but the long-run consequences would be of momentous benefit to the common weal. This was because the early judges were neither trusted by Edward I, nor respected by the social betters over whom they were charged with passing judgment. In order to combat bribery and corruption, therefore, Edward insisted that the judges render their verdicts with great exactitude, showing with precision how they came to their conclusions. But over time, and in efforts to elevate their own standing as men of honor so as to combat the open disdain their social superiors held them in, the judges came to identify themselves with their own verdicts, and it became a matter of professional—and, in turn, social—pride and respect for a judge to be as exact and regular as possible. This ultimately gave rise to the common law: that all verdicts be meticulously delivered and worked out in reference to an ever-growing body of precedent, wherein it was a matter of professional and personal honor for judges—who were specifically identified with their judgments—to adhere to this as strictly as possible (LJ(A) v.16–26). This "little power of the judges in explaining, altering, or extending or correcting the meaning of the laws, and the great exactness with which they must be observed according to the literal meaning of the words" was something "which greatly confirms the liberty of the subjects in England," because it made justice regular, nonarbitrary, and predictable (LJ(A) v.15).

Over time the system grew ever more robust, because being a judge became a position of great social esteem and also of financial security, which together cemented the practice of fair arbitration. Only in England, Smith believed, was one tried by "a judge who holds his office for life and is therefore independent and not under the influence of the king." Although judges in the English common law system had started out as the meanest of individuals, a modern judge was now always "a man of great integrity and knowledge who has been bred to the law, is often one of the first men in the kingdom who is also tied down to the strict observance of the law" (LJ(A) v.36–37). Modern judges were financially very secure, meaning they were generally immune to the temptations of bribery and corruption. Perhaps even more importantly, their entire social standing depended on resisting base and dishonorable

motives such as the attempt to exploit their office for financial gain. A system of honor, combined with favorable financial incentives, kept the legal system largely free from corruption.

The other thing that greatly confirmed the liberty of the English was the long-standing practice of trial by jury in criminal cases. Smith took jury trials to have been meaningfully preserved most extensively and perfectly in England (LJ(A) v.32–33), and when combined with sentences being delivered by independent judges this constituted "a great security of the liberty of the subject." This was because the "point of fact" was determined by jurors, who themselves standardly had no motive other than to deliver a truthful verdict. Having the final sentence passed by an independent judge who was structurally insulated from financial and political pressures meant that the legal process was robustly safeguarded against distortion and corruption at every level. The liberty of ordinary subjects was thus vastly augmented, a function of the security they now received under the protection of the law (LJ(A) v.36–37).

The final benefits of the common law system extended yet further, however, by eventually curbing the power of the Crown itself. While courts were originally instituted and overseen by the monarch, this power was "now taken away" (LJ(A) v.41). An English king could no longer "create any court without the consent of the Parliament; nor can he judge by himself in any cause but must allow the common course of justice to be followed" (LJ(A) v.42). Because the common law's highest court of appeal was the House of Lords, where peers would rule according to statute and precedent (LJ(A) v.32), the result was that *government itself* became subordinated to and regulated by the wider legal system. In other words, the rule of law achieved its highest manifestation, constraining not just those who sat in judgment, but also those who authored the law in the first place. As Smith put it in WN:

> [U]pon the impartial administration of justice depends the liberty of every individual, the sense which he has of his own security. In order to make every individual feel himself perfectly secure in the possession of every right which belongs to him, it is not only necessary that the judicial should be separated from the executive power, but that it should be rendered as much as possible independent of that power. The judge should not be liable to be removed from his office according to the caprice of that power. (WN V.i.b.25; Winch 1978, 95–96; Haakonssen 1981, 140–41.)

Precisely this outcome had been achieved in England. But the roots of this state of affairs were old, ultimately stretching back to the legal

reforms instituted by Edward I: "the courts of England are by far more regular than those of other countries as well as more ancient" (LJ(A) v.42). The common law system, in Smith's view, gave the English a major advantage vis-à-vis liberty. While France and other advanced European states enjoyed the regular administration of justice, their civil law was imperfectly derived from the Roman Law and had suffered from the periodic establishment of new courts and new legal codes, increasing the caprice and unpredictability of judges because "new courts would disdain to follow the precedents of those courts on whose ruin they had been erected." In Smith's view, "New courts and new laws are . . . great evils. Every court is bound only by its own practice. It takes time and repeated practise to ascertain the precise meaning of a law or to have precedents enough to determine the practise of a court. Its proceedings will be altogether loose and innacurate." By contrast, the "law of England is . . . of a peculiar nature and well worth the study of a speculative man (LJ(A) v.43; Haakonssen 1981, 151–53). Or as he put it more directly in LRBL, the advent of the common law and the independent judiciary "may be looked on as one of the most happy parts of the British Constitution." This was true even though it was "introduced merely by chance and to ease the men in power that this Office of Judging causes is committed into the hands of a few persons whose sole employment it is to determine them" (LRBL ii.203). While the rule of law and the regular administration was not unique to England, and neither therefore was modern liberty, both were nonetheless most perfectly realized there (Winch 1978, 39–40; Forbes 1976, 182–87; Haakonssen 1981, 132).

Conclusion

Smith took more seriously than Hume the idea that liberty required not just an appropriate constitution but quotidian security as realized via law. This was in large measure because Smith thought that freedom in modern European conditions both presupposed, and was itself significantly constituted by, legal protection, insofar as this was the most secure mechanism for delivering individuals from the specter of domination (Sagar 2022, chap. 2). To that extent Smith agreed with Montesquieu: liberty required not just a free constitution but a legal system generating security for ordinary people. Where Smith differed from Montesquieu was in thinking that England was the country that had achieved this on a globally unprecedented scale. With regards English liberty, Montesquieu had considered only the much-vaunted English constitution, not examining her legal system as well. Devoting his analysis of the history and composition of laws in Parts V and

VI of the *Spirit of the Laws* to France (Levy 2015, 154–58), Montesquieu missed what Smith sought to emphasize—the unique and unrivalled achievements of the English common law.

English liberty, Smith thought, was in turn likely to prove robust in a way Montesquieu failed to see and for reasons that Hume had not been sufficiently attentive to in the *History*: the long-standing presence of the common law and the independence of the courts and judges, which now buttressed the 1688 settlement. But as a result, English liberty was much older in its core elements than the reforms effected by the Glorious Revolution alone. This pedigree was not due to some mythical founding in the "forests of Germany" but to the unintended consequences of medieval legal reforms interacting with financial and social incentives. Smith accordingly staked out a position intermediate between Hume and Montesquieu, seeking to improve both in turn.

The above has been obscured from readers in part because Smith is not always explicit about how he sees the connections between law and liberty or about how those parts of his framework integrate with his more accessible historical narratives in WN and LJ. Hopefully these matters should now be somewhat clearer. Having said that, there remains obscurity in Smith's account as to how exactly his Humean story of England's constitutional liberty being secured in 1688 meshes with his jurisprudential account of liberty in terms of the security delivered by the common law as already being largely in place before the late seventeenth century, and which (if either) he considers most important. This is an inevitable function of our having to work from lecture notes, without access to Smith's settled views on these matters. For as is well known, Smith had two great works "upon the anvil" before his death but instructed they be destroyed before they could be published (CAS, 248). One of these was the book he described at the close of TMS: an "endeavour to give an account of the general principles of law and government, and of the different revolutions they have undergone in the different ages and periods of society, not only in what concerns justice, but in what concerns police, revenue, and arms, and whatever else is the object of law" (TMS VII.iv.37). The question of how England's political and legal histories combined to generate liberty would, we can infer from LJ, likely have been a very important component of this work had it ever been published. That Smith did not publish it suggests that the obscurity that remains in his account of English liberty may be because he had not managed to work out his final settled position for himself by the time he died. Nonetheless, and as I have tried to show above, the operation and history of law were crucial to Smith's thought in this area. If we want to more fully appreciate his views in the absence of

his lost work, we would do well to take him at his word and pay close attention to what survives of his attempt at a "history of jurisprudence" (TMS VII.iv.37).

Yet the obscurity that remains in Smith's account is also likely to reflect a deeper set of problems to do with the difficulty that eighteenth-century thinkers faced in trying to make sense of rival modes of government. From our present historical vantage point it can seem just obvious that the English mixed constitution would prove stable and robust, the settlement imposed by the Glorious Revolution apparently seamlessly evolving into the still-existing, and extraordinarily historically influential, British state as it is found today. Eighteenth-century France, by contrast, can with hindsight seem as though it were obviously and inevitably doomed to fail: an *Ancien Regime* heading inextricably toward revolution and collapse. But this is simply not how it looked back then.

Prior to 1789, to many astute observers of the mid- and late-eighteenth century it was *Britain* that looked most in danger of collapsing in on itself (Whatmore 2019, 347–51). This, after all, was an entirely new form of constitution, with no significant historical track record, and in which party conflict appeared to be a necessary feature—an ominous sign for a polity that had destroyed itself through the ravages of faction only a century earlier (Skjönsberg 2021). When Montesquieu described the English state as being a republic hidden under the guise of a monarchy, one way to interpret this was that, like all republics, England would eventually degenerate into tyranny. Adam Ferguson later worried that Montesquieu had gotten it exactly right (McDaniel 2013; Plassart 2015, chap. 6). France, by contrast, was a state that had been in continuous existence for centuries and was arguably the apex of modern European civilization. It was far from obvious that the new constitutional order of a recently united island, only just emerged from civil war and protracted constitutional strife, and loaded with the strange new innovation of public war debt, would outlast the grandest old monarchy of the continent.

This mattered because, to put it in Hume's terms, it was far from clear how political organization on a mass scale in modern conditions could achieve a successful and lasting balance between liberty and authority. Debate over the rival merits of the British and French systems (of which Montesquieu, Hume, and Smith's contributions represent only a single episode) was ultimately a debate over whether and how either of these political systems could not only survive but enable their populations to flourish. Smith saw more clearly than Hume that the law was especially important in this regard, because a properly constituted legal system could be the enabler,

guarantor, and source of balance between both authority and liberty. And again, from our present historical vantage point, it can be tempting to conclude that Smith simply got it right. The common law, after all, has continued to prove remarkably robust as a source of liberty while also helping to manage the proper balance of authority in the British state. Yet we should hesitate before concluding that the intervening history has settled the matter. Montesquieu would likely have cautioned that the common law, like the English constitution as a whole, is sustained only by the willingness of its participants to continue to go along with it—and that while Smith might have been correct that everyone in Britain would be "shocked" at any attempt to break with such convention, indignation alone is no good guarantor of rights (LJ(A) v.5).

Of course, the French monarchy that Montesquieu lauded as an alternative proved significantly less robust than British indignation, and the birth pains of what has finally emerged as the modern French state were extraordinarily severe and suffered not only by the French but by much of Europe too. More fundamentally the question of what, if anything, can be made to guarantee rights *beyond* convention and indignation—or what Hume and Smith called the "opinion" of mankind—was by no means settled in the eighteenth century (Sagar 2018). Indeed, it remains very much an open question today.[3]

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